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No. 08-696

In the Supreme Court of the United States

SOUTHERN SCRAP MATERIAL COMPANY, L.L.C., AS OWNER OF THE SOUTHERN SCRAP DRYDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 46 U.S.C. 30505 (2006) limits the liability of a non-negligent vessel owner when the United States seeks reimbursement for expenses incurred in removing a wrecked vessel obstructing navigable waters in violation of 33 U.S.C. 409.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 541 F.3d 584. The opinion of the district court (Pet. App. 28-37) is not published in the *Federal Reporter* but is available at 2007 WL 1234995.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (Rivers and Harbors Act),

contains several sections known as the Wreck Act, 33 U.S.C. 409, 411, 412, 414, 415. As originally enacted, the provision now codified at 33 U.S.C. 409 made it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Rivers and Harbors Act § 15, 30 Stat. 1152. That section further provided that "whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, * * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same." *Ibid.* If the owner failed to do so, the vessel was subject "to removal by the United States as hereinafter provided for" in 33 U.S.C. 414 and 415. Rivers and Harbors Act § 15, 50 Stat. 1153.

Section 414, in turn, set out a procedure by which the Secretary of the Army could remove the wrecked vessel without incurring liability to the vessel owners. It allowed the United States to sell the vessel and its contents, with "any money received from the sale of any such wreck * * * covered into the Treasury of the United States." Rivers and Harbors Act § 19, 30 Stat. 1154. Section 415 provided for expedited removal procedures in emergency situations, and it too allowed the United States to sell the wrecked vessel and its contents, although the government's recovery from such a sale was limited to its removal expenses. § 20, 30 Stat. 1154-1155.

b. The original Wreck Act provided criminal penalties for violations of Section 409, see 33 U.S.C. 412, but it did not expressly provide in personam civil remedies for the United States. In *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), this Court held that the statute impliedly authorized the United States to bring an in personam action against a negligent vessel

owner to recover the government's expenses in removing a wrecked vessel. *Id.* at 204-205.

c. In 1986, Congress made several amendments to the Wreck Act. As relevant here, the amendments added language to Sections 414 and 415 that provided that when the government removes a vessel under one of these sections, the vessel's owner is "liable to the United States" for any removal costs that "exceed[] the costs recovered under" the in rem sale procedures. Water Resources Development Act of 1986, Pub. L. No. 99-662, § 939(b), 100 Stat. 4199. Additionally, Congress deleted the phrase "voluntarily or carelessly" in Section 409, making it unlawful to "permit or cause [a vessel] to be sunk" in navigable waters. § 939(a)(1), 100 Stat. 4199.

2. Petitioner owned a floating drydock located on the Industrial Canal in New Orleans. When Hurricane Katrina struck New Orleans on August 29, 2005, the drydock broke free from its moorings and sank in the canal. The United States Army Corps of Engineers (Corps) concluded that the sunken drydock was a hazard to navigation in the heavily traveled waterway, and it asked petitioner to remove the wreck. Petitioner stated that it would be unable to do so in a timely fashion, so the Corps hired a contractor to remove the vessel. Removal costs totaled about $8 million, which petitioner refused to pay. Pet. App. 4-5.

3. Petitioner filed a petition for limitation of liability in the Eastern District of Louisiana. Pet. App. 5. Petitioner invoked the Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (Limitation Act) (46 U.S.C. 30505 *et seq.*).* The Limitation Act limits a vessel owner's liability for certain mari-

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* All references to Sections 30505 and 30511 are to the statute as it will be codified in the 2006 edition of the United States Code.

time-related legal claims, including claims arising from collisions, damage to freight, and "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner." 46 U.S.C. 30505(b). If the Limitation Act applies to a claim, the owner's liability "shall not exceed the value of the vessel and pending freight." 46 U.S.C. 30505(a). Petitioner contended that the post-accident value of the drydock was about $316,000, and it sought to limit its liability to that amount. Pet. App. 5. Petitioner also asked the district court to enjoin all actions against it based on the sinking of its drydock. *Id.* at 29; see 46 U.S.C. 30511. The district court granted that request and issued an order requiring any party with a claim against petitioner to file the claim as part of the limitation action. Pet. App. 6.

The United States filed a timely claim seeking full reimbursement under the Wreck Act for the removal expenses it had incurred. Pet. App. 6. Thereafter, it moved to modify the district court's order to permit it to pursue its Wreck Act claim in a separate proceeding against petitioner, free of any liability cap under the Limitation Act. *Ibid.*

The district court granted the motion. Pet. App. 28-37. The court concluded that the United States had an in personam remedy against petitioner under the Wreck Act, and that the remedy was not impeded by the Limitation Act, even in cases where the ship-owner was not negligent. *Id.* at 34-37.

4. Petitioner took an interlocutory appeal from the district court's order modifying its injunction. The court of appeals affirmed. Pet. App. 1-25.

The court of appeals first examined whether, independent of the Limitation Act, the United States could

seek reimbursement under the Wreck Act for a wreck that was not caused by the owner's negligence. The court answered that question in the affirmative, noting that when *Wyandotte* had recognized an implied right of action in cases of negligence, this Court had relied in part on the reference in Section 409 to "voluntarily or carelessly" sinking a vessel. Pet. App. 16. Congress's decision to remove that language when it amended the statute in 1986 showed that Congress intended to do more than merely codify *Wyandotte*; it also intended to impose strict liability on vessel owners. *Id.* at 16-17. The court of appeals drew additional support from the fact that the 1986 amendments expressly allowed the government to obtain in personam recovery for all removals under Sections 414 and 415, whether or not the wrecks were caused by negligence. *Id.* at 17-18.

The court of appeals next determined that the Limitation Act posed no bar to the United States' claim. The court explained that the application of the Limitation Act to a Wreck Act claim would nullify the 1986 amendments to the Wreck Act, as it would limit the United States to the in rem recovery that had previously existed. Pet. App. 20-21. The court therefore applied the principle that "when two statutes irreconcilably conflict, the more recent statute controls." *Id.* at 21. Finally, the court examined the Limitation Act's legislative history and concluded that the statute had not been intended to apply to wreck-removal claims brought by the United States. *Id.* at 24-25.

ARGUMENT

Petitioner renews its claim (Pet. 11-25) that it should be free of in personam liability for the expenses the United States incurred in removing petitioner's drydock after it broke loose from its moorings and sank in a

heavily traveled waterway. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner does not suggest that the decision below conflicts with any decision of any other court of appeals. Indeed, petitioner admits (Pet. 13) that this is the first case in which any court has considered the relationship between the Limitation Act and the reimbursement provisions of the post-1986 Wreck Act when a shipowner is not negligent. Instead, petitioner asserts (Pet. 17-18) that the decision of the court of appeals conflicts with the principle that repeals by implication are disfavored. See, *e.g.*, *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141 (2001). Even if that were true, such an abstract conflict about general principles of statutory interpretation would not warrant this Court's review. In any event, the court of appeals correctly interpreted both the Limitation Act and the Wreck Act.

By its terms, Section 414 makes a vessel owner "liable to the United States for the cost of removal * * * which exceeds the costs recovered" under the in rem sale provisions of that section. 33 U.S.C. 414(b). Similarly, Section 415 provides that a vessel owner "shall be liable to the United States for the actual cost, including administrative costs of removal * * * which exceeds the costs recovered" under that section's in rem sale provisions. 33 U.S.C. 415(c). Although neither section mentions the Limitation Act, Sections 414 and 415 both impose in personam liability on a vessel owner, over and above the value of the vessel that is recoverable in rem, when the United States removes the vessel under one of

these sections. And neither section limits that liability to cases in which the vessel owner is negligent.

Petitioner nonetheless attempts (Pet. 19) to find such a limitation through a strained reading of the first sentence of Section 409. Despite the fact that Congress removed the words "voluntarily or carelessly" from that sentence in 1986, petitioner reads the remaining words of the sentence as requiring affirmative action on the part of the vessel owner before there can be Wreck Act liability. See 33 U.S.C. 409 ("It shall not be lawful to * * * sink, or permit or cause to be sunk, vessels or other craft in navigable channels."). That reading is difficult to reconcile with the broad language of the "*permit* or cause to be sunk" phrase, and it ignores Congress's conscious decision to delete the "voluntarily or carelessly" phrase.

More to the point, it is the *second* sentence in Section 409, not the first sentence, that subjects a vessel to removal under Sections 414 and 415: "And whenever a vessel * * * is wrecked and sunk in a navigable channel, * * * it shall be the duty of the owner * * * to commence the immediate removal of the same, * * * and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States." 33 U.S.C. 414, 415. That sentence contains no language that can be read to limit its reach only to cases of negligent sinking. Accordingly, Section 409 gives the United States the right to use Sections 414 and 415 to remove non-negligently caused wrecks, and the removal of such wrecks subjects the owner to the in personam liability provisions in both sections.

If the Limitation Act applied to limit petitioner's liability, it would be directly contrary to the Wreck Act, and the court of appeals correctly gave effect to the

later-enacted statute. Pet. App. 21-22. But the Limitation Act can be reconciled with the Wreck Act, although not in a way that helps petitioner. The Limitation Act applies only to losses or damages incurred "without the privity or knowledge of such owner." 46 U.S.C. 30505(b); see *American Car & Foundry Co.* v. *Brassert*, 289 U.S. 261, 264 (1933) (explaining that because of the "privity or knowledge" language, the "liability thus limited is an imputed liability; * * * [f]or his own fault, neglect, and contracts the owner remains liable"). Petitioner suggests that when a wreck occurs for reasons other than the vessel owner's negligence, the Limitation Act absolves the owner from liability because the wreck occurred without its "privity or knowledge." But under the Wreck Act, it is not the mere fact of the wreck that gives rise to the owner's in personam liability. Rather, the owner becomes liable to the government only after failing to carry out its "duty * * * to commence the immediate removal of the same." 33 U.S.C. 409. And as the Second Circuit has recognized, the breach of that duty is within the "privity or knowledge" of the owner, bringing the owner outside the Limitation Act's protections. *In re Chinese Maritime Trust, Ltd.*, 478 F.2d 1357, 1360-1361 (1973), cert. denied, 414 U.S. 1143 (1974).

2. Contrary to petitioner's suggestion (Pet. 15-16), the court of appeals' decision is in no way inconsistent with *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967). The Court in *Wyandotte* expressly declined to consider the application of the Wreck Act to cases in which the vessel owner was not negligent: "Questions involving a non-negligent sinking * * * are not now before us and we do not mean to indicate what relief, if any, may be available to the Government in that

situation." *Id.* at 197 n.5. Similarly, while the Court discussed and analyzed the Limitation Act, see *id.* at 205-206, it did not consider whether the Limitation Act applies in Wreck Act cases. See *id.* at 205 n.17 ("We do not, of course, pass on the applicability of the Limitation Act, before or after passage of the Rivers and Harbors Act, to the facts of the case now before us."). More importantly, *Wyandotte* merely construed the pre-1986 version of the Wreck Act. Nothing in that decision can be understood to be an interpretation of the current version of the Wreck Act, which now contains an express recognition of the right of the United States to bring an in personam reimbursement action. 33 U.S.C. 414(b), 415(c).

Petitioner nonetheless alleges (Pet. 16) that the decision below conflicts with the "policy considerations and equities that drove the decision" in *Wyandotte*. Such an abstract "conflict," which does not entail a conflict with any holdings of this Court, does not warrant review. And to the extent that petitioner alleges such a conflict with the court of appeals' own precedents, (Pet. 13-17), there is also no basis for this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, there is no conflict with the "policy considerations" of *Wyandotte*. Petitioner claims (Pet. 16-17) that the decision below is in tension with *Wyandotte* because it will allow a negligent party (allegedly the government) to shift the costs of removal onto a non-negligent party. But there is no basis for supposing that the government acted negligently in this case. As the court of appeals explained, given the procedural posture of the case, it was appropriate for that court to treat the district court's order as though it had come "in the form

of a denial of a Rule 12(b)(6) motion brought by" petitioner. Pet. App. 7. The court therefore accepted as true the facts as stated in the United States' claim, which contained no allegations of the government's negligence. *Ibid.* Indeed, petitioner's own complaint was devoid of any allegations of government negligence; the closest petitioner came was the nonspecific allegation that its drydock had been sunk by "Act(s) of God or by other man-made or natural conditions beyond Petitioner's control and/or by the fault or neglect of other parties and/or vessels." Compl. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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